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CHARLES ELMORE

No. 62. October Term, 1929.

IN THE

Supreme Court of the United States

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEE.

WILLIAM J. CONLEN,
Counsel for Appellee.

SAMEL MOYERMAN,
Of Counsel.

International, 236 Chestnut St., Philadelphia

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IN THE

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JOHN BAIZLEY IRON WORKS AND THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED,

Appellants,

v.

ABRAHAM SPAN,

Appellee.

BRIEF FOR APPELLEE

I. REFERENCES TO OPINIONS OF PENNSYLVANIA SUPREME COURT AND PENNSYLVANIA SUPERIOR COURT.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania, is printed on pages 20 to 37, inclusive, in the transcript of record, and is reported sub nom. Span v. John Baizley Iron Works, *et al.*, in 295 Pa. St. 18 (144 Atl. 753).

The opinion of the Superior Court whose judgment was affirmed by the State Supreme Court, appears on pp. 16 to 19, inclusive of the transcript of the record and will be found reported sub nom. Span v. Accident & Guarantee Corporation, in 92 Pa. Super. Ct. 418.

II. STATEMENT OF THE CASE.

On the day of the accident, and just before the accident, Appellee had been at work in the boiler shop of the John Baizley Iron Works (R., 4), by which he was employed as a blacksmith helper (R., 3, 8). Late in the afternoon (R., 5), he was injured on board a ship in navigable waters, while painting angle irons (R., 2, 7, 8). The injury was to his eyes and was caused by sparks which flew from an acetylene torch in the hands of a fellow workman (R., 5, 8). The Compensation Referee found that the ship "steamed into Philadelphia" and that it was "out of commerce" (R., 8), and "that on January 13, 1926, The Ocean Accident & Guarantee Corporation, Ltd., was the compensation insurance carrier of the Defendant, and they have agreed to pay for the Defendant to the Claimant any compensation that may be found to be due arising out of these proceedings" (R., 9).

The Pennsylvania Insurance Code of May 17, 1921, P. L. 682, Art. VI, Sec. 651, provides that the agreement of the insurance carrier to pay awards, "shall be construed to be a direct promise to the injured employe or to the dependents of the deceased employe having a claim under the act, and shall be enforceable by action brought in the name of such injured employe or in the name of such dependents." Section 652 of the Act provides that suit on the policy by the carrier for premiums, shall not be maintained on a policy "which violates any of the provisions of this act."

III. SUMMARY OF ARGUMENT.

The facts of this case indicate that the question involved is one of local concern. The application of the Pennsylvania Workmen's Compensation Act is constitutional, because it does not interfere with the necessary uniformity of the maritime law in its interstate or foreign commerce aspects, or prejudice any of the characteristic features of the maritime law, because the employment was not maritime in character, the parties to the contract of employment are not shown to have had maritime law in contemplation, nor does the situation warrant the inference that they had, and the record does not sufficiently indicate a situation where the maritime law should be applied.

The opinion of the state court should be upheld, because the Pennsylvania Act is voluntary, and specifically provides that the insurance carrier's policy of insurance shall contain a covenant that it will pay any award made directly to the employee; and the carrier is made primarily liable to the employee; and the employee given a right of action directly against it; and it has not been clearly shown that the opinion of the Supreme Court violates the provisions of the Constitution on which the Appellant relies.

IV. ARGUMENT.

A. Introduction.

At the outset of the argument, the Appellee desires to point out the absence of certain facts on the record in this case, which have heretofore appeared before this Court in dealing with the question here involved.

1. The record contains nothing to indicate that Appellee was a marine repairman, employed to work as such, or that he regularly so spent even part of his time, or that he had ever before worked as a marine repairman, other than what inference may be drawn from the fact that at the time of the injury, he was painting angle irons on the "Bald Hill". In short, there is nothing to *show that the contract of employment contemplated any work of a maritime nature,* or repair to any instrumentality of commerce.

2. Nothing to indicate the character of the business conducted by John Baizley Iron Works, or that it generally engaged in repairing ships, or in work of a maritime nature.

3. Nothing to indicate the type, size or use of the ship, "Bald Hill", on which the injury occurred, or that it was engaged in foreign or domestic commerce, other than such inference as may be drawn from the fact that the "Bald Hill" had "Steamed into Philadelphia for necessary repairs" (R., 19).

The Court's attention is specifically called to that provision in the Act of Pennsylvania which provides that the employee may sue in his own name directly against the insurance carrier, and the further provision that the agreement of insurance of the carrier shall be construed to be a direct promise to such injured employee to pay any award given, and to the provision that no suit for premiums may be brought on a policy violating the provisions of the Act

(Act of May 7, 1921, P. L. 682; Art. VI, Sec. 651, 652) (Appendix, p. 33).

The policy in this case was, at no stage of the proceedings, produced by the Appellant. The Workmen's Compensation Act of Pennsylvania is a voluntary one,[1] and under it the employer may contribute to the state fund or privately insure, at his election;[2] but if he privately insure, as in this case, the insurance carrier is directly responsible to the employee. The Referee in this case made an award against the insurance carrier, and no judgment was entered against the employer. It was the insurance carrier which filed the appeal to the Common Pleas Court, on which judgment was entered, and the insurance carrier which filed the appeal to the Superior Court (opinion of Superior Court (R., 17)), on which the appeal to the State Supreme Court was based. The insurance carrier inserted the name of the iron works in its appeal to the Superior Court (R., 17), which the Superior Court, in its opinion, stated was surplusage (R., 17).

We will now merely advert to the well-established doctrine that the admiralty clause does not preclude state laws affecting matters of local concern, although pertaining to maritime affairs.[2a]

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[1] Act of June 2, 1915, P. L. 736, Art. III, Sec. 301, 302 (a).

[2] Act of April 7, 1921, P. L. 114, No. 67, Sec. 1.

[2a] State pilotage laws held applicable to a vessel entering a harbor: *Cooley v. Board of Wardens*, 53 U. S. (12 How.) 299 (1851). Vessel held subject to state and local inspection and quarantine laws; *Morgans L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455 (1886); *Compagnie Francais v. State Board of Health*, 186 U. S. 380 (1902).

A state law giving a right of action for a wrongful death is enforceable even though death is occasioned from occurrences on navigable water, if the suit is brought in a state court: *Steamboat Co. v. Chase*, 83 U. S. (16 Wall.) 522 (1873); *Sherlock v. Alling*, 93 U. S. (3 Otto) 99; or if the suit is brought in a federal court: *Western Fuel Co. v. Garcia*, 257 U. S. 233 (1921).

A state may regulate the rates charged for carriage on a navigable stream; on state improved waterways: *Sand v. Manistee River Imp. Co.*, 123 U. S. 288 (1887); *Huse v. Glover*, 119 U. S. 543 (1886); between two points in a state when the voyage between them is on the sea: *Wilmington Transportation Co. v. The Railroad Co.*, 236 U. S. 151 (1915); or ferriage from one state to another: *Port Richmond and B. P. Ferry Co. v. Board*, 234 U. S. 317 (1914).

Municipal regulation of wharfage charges permitted: *Packet v. Keokuk*, 95 U. S. 80 (1877); *Packet Co. v. Catlettsburg*, 105 U. S. 559 (1882); *Parkersburg & Ohio River Transp. Co. v. Parkersburg*, 107 U. S. 691 (1882).

Two tests of constitutionality of state regulation in matters of maritime concern, have been applied by this Court:

First, that the state statute must not interfere with the necessary uniformity of the general maritime law in its relation to interstate or foreign commerce.

Secondly, must not prejudice the characteristic features of the maritime law; but from the earliest times, this Court has said that in fixing the boundary of admiralty jurisdiction, the test is a "reasonable and just" construction of the words used in the Constitution, taken in connection with the whole instrument, and the purpose for which admiralty and maritime jurisdiction was granted to the Federal Courts.

The Steamer St. Lawrence, 1 Black (66 U. S.) 522 (1861).

And in dealing with another phase of the question, this Court has said that the guiding principle shall be the fixing of the boundary on "just and logical grounds".

Lottawanna, 21 Wallace (88 U. S.) 558 (1874).

The appellee's position is, that the opinion of the State Supreme Court should be supported, because it is based upon "just and logical grounds", and is a "reasonable and just" construction of the words in the Constitution, and does not interfere with the necessary uniformity of the general maritime law in interstate or foreign commerce, and does not prejudice the characteristic features of the maritime law.

B. Employment Essentially of Local Concern.

1. The Application of the State Compensation Act Does Not Interfere With the Necessary Uniformity of General Maritime Law in Interstate or Foreign Commerce.

In this case, there is nothing of record to indicate that interstate or foreign commerce is involved. It nowhere

affirmatively appears of record either that the owner of the ship or the ship itself, was either before or at the time of or thereafter, engaged in interstate or foreign commerce, or was an instrumentality of such commerce.

Moreover, the repair of an instrumentality of interstate commerce withdrawn for repairs does not constitute work done in interstate commerce and a compensation act of a state applies to an employee engaged in such repair.

Industrial Accident Com. v. Davis, 259 U. S. 182 (1922).

The suit is on a contract, which in no way relates to interstate or foreign commerce. It is a suit to enforce a statutory liability, on an insurance policy which the state statute requires shall contain an actual covenant to pay the award.

2. The Application of the State Compensation Act Does Not Prejudice the Characteristic Features of the Maritime Law.

But if we regard the contract of employment as the contract involved, rather than the contract of the insurance carrier, the question remains whether an employee, a mechanic who hires as a blacksmith's helper, and works in the boiler shop of an iron works, and who, during a day's employment, happens to be sent on board ship to paint angle irons, and is injured while so doing, is entitled to compensation, when his contract of employment is not shown to contemplate work having to do with commerce in any way, or any maritime activity, and one wherein nothing appears to show that either employer or employee was generally engaged in industry of any maritime sort whatsoever, save such work as was being done at the time of injury, and, for aught that appears, the work being done by the mechanic could have been done on land. (See Comments of Supreme Court of Pennsylvania (R., 24, 34, 35, 36).)

When employment is in connection with essentially maritime industry, and both employer and employee are regularly so engaged, the maritime law may govern the situation, but no such facts here appear.

The reasoning of cases dealing with the application of Workmen's Compensation Laws to injuries occurring on navigable waters, indicates that this Court, in viewing the situation of the parties and the law properly applicable, has considered the presence or absence of facts disclosing whether the parties contemplated the maritime law as the basis of their rights and liabilities, or whether the business was closely connected with maritime matters as of importance in reaching a conclusion. In support of this view, we will first discuss those cases in which compensation acts have been held applicable, and will then discuss those cases upon which appellant relies, and will further develop the application of prior rulings to the facts involved in the case at bar.

3. Analysis of Cases Sustaining Appellee's Position.

In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469 (1922), it was held that a state compensation statute *abrogated* the right of recovery in admiralty for injuries sustained as the result of tort on navigable waters while at work on a launched but incompleted vessel. There the situation was precisely that in the case at bar, save that the vessel in the Rohde case was uncompleted. The Court said (p. 476):

> " . . . as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund, it cannot properly be said that *they consciously contracted with each other in contemplation of the general system of maritime law.*[3] *Union Fish Co. v. Erickson, 248 U. S. 308.* Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to

[3] All italics ours unless otherwise indicated.

any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

But in the case of the Union Fish Co. v. Erickson, 248 U. S. 308 (1919), unlike the situation in the case at bar, and unlike the situation in the Grant Smith-Porter Ship Company v. Rohde case (*supra*), the object of the employment was distinctly work as a seaman. The services to be rendered under the contract were services as master of the vessel, and the Court said (p. 313):

> "In entering into this contract the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California. *The parties must be presumed to have had in contemplation the system of maritime law under which it was made.*"

And the contract was held enforceable, although the defense tendered was, that it was a contract made in California, and since made there, was governed by the California Statute of Frauds, which required a written agreement for a contract for services extending beyond a year.

In the case at bar, the parties "contemplated" employment in Pennsylvania and contracted with that law in view, as appears from their situation disclosed by the record.

Counsel for appellant seeks to distinguish the Rohde case on the ground that a contract to repair a vessel is within admiralty jurisdiction, whereas a contract to construct a vessel is not within the jurisdiction of admiralty, and reason that therefore, the compensation agreement may not be enforced in the instant case, although it was enforced in the Rohde case. But the contract here in question is not a contract to build or repair a ship; *it is either the contract of employment between employer and employee*, or, as we shall

hereafter maintain, it is really the contract made as required by the act between the employee and insurance carrier.

Regarding the contract involved at this stage of the argument as the contract of employment, the question should be regarded in the light of the incidents of that contract of employment, it being a contract calling for work which does not involve commerce, and on the facts of this case, one not prejudicing any uniformity of the maritime law.

The contract of employment was that of a mechanic to render services to an *iron works* (R. 3), the services being as a blacksmith's helper (R. 3), and to an iron works not shown to be engaged in maritime work.

Appellant also seeks to distinguish the Rohde case on the ground that in that case, the parties contributed to the industrial accident fund, whereas in the case at bar, the employer, instead of contributing to the industrial accident fund of Pennsylvania, as permitted by state statute, made compensation arrangements with a private insurance carrier. Appellant states (p. 51) of the Rohde case that "the parties were clearly within the terms of the statute, because the contract was non-maritime, and they were consciously within its terms because each of them had contributed to the industrial accident fund".

May we not at this stage with propriety ask thequestion, whether, assuming first that the contract of employment is the one involved, a mechanic who contracts to act as blacksmith's helper in an iron works, and his employer, instead of contributing to a state accident fund, as in the Rohde case, takes out insurance in a form and manner permitted by the act in lieu of contribution to the state fund, are not clearly within the terms of the statute, because their contract is distinctly non-maritime? Surely, a blacksmith's helper, in making his contract with an employer, cannot be said to contemplate marine work of any character whatsoever, especially, when it is not shown that the contract did not call for work of a marine character, and the employer was not shown to be generally engaged in maritime work. The par-

ties are consciously within the terms of the compensation act from either aspect of the situation, whether we have in view the contract of employment or the contract of insurance. If contribution to a state accident fund implies a consciousness of the statute, can the employer say that he is unconscious of the statute, because instead of contributing to the fund, he places insurance as permitted by the statute, in lieu of his contribution; or, can an insurance carrier who makes a direct promise as required by the statute, to an employee, under which statute he must covenant to be primarily liable to the employee, and suable directly by the employee, be said to be not consciously within the terms of the act.

This position of the appellant seems to be that when one contributes to a state accident fund, one is conscious of the statute, but when one enters into a contract with a private carrier for compensation to employees, the contract is made in total unconsciousness of the statute, and when one accepts a premium under an act which requires an agreement to pay an award, one is just as unconscious of the act as he is of the award.

In subsequent cases, now to be discussed, this Court has repeatedly interpreted the Rohde case as holding a state compensation law applicable when the situation of the parties is such that the state law must have been regarded by them as the basis of their rights and liabilities.

Thus, in *State Industrial Comm.* v. *Nordenholt Corp., et al.*, 259 U. S. 263 (1922), the Court in speaking of the Rohde case, said (p. 275):

> "The Oregon Workmen's Compensation Law prescribed an exclusive remedy, and the question presented was whether to give it effect would work material prejudice to the general maritime law. The accident occurred on navigable wa.ers and the cause was of a kind ordinarily within the admiralty jurisdiction. Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter."

The result in the Rohde case *as this Court has said* in the above quotation, was reached by regarding the general incidents of the contract of employment, and not because a contract to build a ship is non-maritime.

In *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 59 (1926), recovery under a state compensation statute, was permitted to the representatives of a diver drowned in navigable waters while at work on the river bed in removing abandoned ways which had become a menace to navigation. Making a waterway readily navigable is as important to navigation as the ships themselves, but the matter was regarded from the viewpoint of the situation of the parties and the contract between them and under those circumstances, recovery of compensation permitted.

The Court said (at pp. 64 and 65):

> "The record discloses *facts* sufficient *to show a maritime* tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the State will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

Thus in *Alaska Packers Association* v. *Industrial Accident Commission, et al.*, 276 U. S. 467 (1928), recovery of compensation under a state statute was permitted even to a seaman. The facts were stated by this Court (at p. 468):

> "Petitioner (employer) is a California corporation engaged in the business of taking fish in Alaska and canning them at its factory located in that Territory. Peterson (employee) resided in California. Within that State he entered into a contract with the Association, whereby he agreed to go to Alaska as a seaman on its bark "Star of Iceland" and, after arriving at the cannery, to go ashore and act there as directed—'any-

thing I was told to do'. Among other things, he made nets, fixed up the small boats always kept there, took them out, and served as a fisherman on one of them."

This Court assumed that the injury was such as was within admiralty jurisdiction, but held the state act applicable.

The *general* incidents of the contract of employment were considered, the Court saying (at p. 469):

> "Peterson (employee) was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character."

That part of employment in which the employee acted as a seaman was maritime in character, but the Court, as stated in the opinion, looked to the *general* incidents of the employment in deciding that the contract of compensation was enforceable, because the *general* work contracted for was not directly connected with commerce, and such were the situation and terms of employment of the appellee in the case at bar.

The same rule was reiterated in the *Sultan Ry. Co.* v. *Department of Labor, et al.*, 277 U. S. 135 (1928), wherein the Court said (p. 137):

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules, which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

In the last two cases discussed the Court assumed the work to be maritime, but held the compensation act applicable. Grant Smith-Porter Co. v. Rohde (*supra*) is therefore not distinguishable from the instant case on the ground that in that case the work was done on an incompleted vessel, the contract to build a vessel being not maritime, because as to maritime matters local in character, a state act may apply. In the case at bar, it is not shown that maritime employment was contemplated or that the parties were generally engaged in maritime employment.

In *Rosengrant* v. *Havard,* 273 U. S. 664 (1927)—(The facts of this case are reported in 211 Ala. 605; 100 So. 897 (1924), and 213 Ala. 202; 104 So. 409 (1925)), compensation was sought by the representatives of a deceased employee who at the time of his death was engaged in tallying and grading lumber being unloaded from a barge. Lashed to the barge was a schooner on which the decedent was performing his work. A tugboat was standing by to tow away the barge when unloaded. The employee was accidentally killed by a bullet from a pistol in the hands of a member of the crew of the tug. The judgment of the state court sustaining an award of compensation was affirmed in a memorandum decision of this Court.

Here is a situation in which the employee was acting as a stevedore, but the Court evidently regarded his contract of employment as one not contemplating any regular maritime pursuit and *considered* the fact that the work on navigable waterways was not *regularly* incident to his employment.

Several cases in which this court has refused certiorari were cases in which the employee at the time of the injury was doing work of a maritime character but the court, regarding the *general* incidents of the contract of employment and its relation to commerce, held the compensation act applicable.

Southern Surety Co. v. *Crawford,* 274 S. W. 280; (Cert. denied, 270 U. S. 655 (1926));

United Dredging Co. v. *Lindberg,* 18 Fed. (2) 453; (Cert. denied, 274 U. S. 759 (1927));
Nashville Builders' Supply, et al., not reported; (Cert. denied, 277 U. S. 606 (1928)).

The facts in this latter case are so clearly in line with the facts in the case at bar, and the decision of the Court proceeds so closely on the line of the reasoning in appellee's argument herein under point "C" *infra,* that the appellee calls the Court's attention especially to this case, and because it is not reported, has secured a certified copy of the opinion of the Supreme Court of the State of Tennessee, and attached the opinion in toto to this brief in the appendix (p. 34).

In *Employers' Liability Assurance Corp., Ltd.,* v. *Cook,* 31 Fed. (2) 497 (C. C. A. 5th), (*Petition for certiorari to this court granted October 21, 1929, No. 81, October Term, 1929*), the employee in an assembling plant was killed while unloading cargo from a vessel in navigable waters. Only once previously had he been used in unloading vessels. The court held the compensation act of the state applicable, stating (p. 498 of opinion):

> "The injury to the employee in the case at bar was not caused by a tort; it was a pure accident. Appellee could obtain no relief in admiralty, and has none, unless it be under the Texas Workmen's Compensation Law. We are of the opinion that the state statute applies under the peculiar facts of this case. As in the Rohde case, *the employee and employer did not contract in contemplation of the maritime law. The employee's work was to be done on land.* It was only because he was directed to do so that he ever went aboard the ship. . . . The work he did in unloading the "Lake Gorian" on her two trips to Houston was so infrequent ,and occupied so small a part of his time, as to be merely *incidental* to his regular employment."

In the case at bar it is not even shown that the appellee had ever before worked on a vessel upon a navigable waterway. Such work as he was doing at the time of injury was at most "incidental to his regular employment", *i.e.*, a blacksmith's helper in a boiler shop. It was work not contemplated by the parties at the time of hiring and work in which the employee was not regularly engaged.

To hold the maritime law applicable to the employment because the injury occurred on navigable waters would disturb the incidents of employment as expected and as intended by the parties.

Even if the work involved is of a maritime nature, a state compensation act has been held applicable provided the matter is of a local concern, and when it is not shown that either employer or employee are generally engaged in a maritime occupation, the matter is of local concern, and the mere fact that for the one time when the injury occurred some work was done on navigable waters cannot in line with prior decisions of this court make the matter aught but one of local concern, nor do cases upon which appellants rely support any other conclusion.

4. Discussion of Cases in Which Maritime Law Applied.

An analysis of the facts and of the reasoning of cases which appellant cites as governing this case discloses that in those cases the situation, business and employment of the parties were of a nature much closer to commerce and maritime engagements than that of the parties in the case at bar, and further that in most of the cases the question before the court was whether an admiralty court had jurisdiction and not whether compensation under a state might have been obtained had it been sought. Such cases differ not only in kind but in degree from the case at bar.

But before analyzing these cases appellee will discuss the significance of the point that many cases merely hold that an admiralty court has jurisdiction of the subject matter, and this holding in no way touches upon the question

of whether the compensation act may govern the rights and liabilities of the parties.

In the words of this court (p. 526):

"There is a wide difference between the power of a court upon a question of jurisdiction and its authority over its mode of proceeding and process": *The Steamer St. Lawrence* v. *Black*, cited at p. 6, *supra*.

The importance of this distinction is made manifest in *Grant Smith-Porter Co.* v. *Rohde* (*supra*, p. 8), in which case, as above stated (p. 8), a carpenter was injured while at work on a launched but uncompleted and uncommissioned vessel lying in navigable waters within the state of Oregon. The injured carpenter brought proceedings in Admiralty against his employer in personam alleging injuries caused by the employer's negligence. There was in effect a compensation statute of the optional type by which the act applied unless rejected by either party. Neither employer nor employee had rejected the act. Two questions were certified to this Court. 1. "Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters? 2. Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?" To which certified questions the court answered (pp. 477-478 of opinion), "Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State, we answer, yes.

"Assuming the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

The Court distinctly recognized that admiralty had jurisdiction over matters occurring on navigable waterways,

but distinctly held that the right of recovery might be abrogated even when jurisdiction was present.

We will now merely outline the facts of cases relied upon by appellant in order to indicate the presence of facts distinguishing the case at bar.

In *Southern Pacific Steamship Co.* v. *Jensen,* 244 U. S. 205 (1917), the employer was a common carrier by water.

In *Great Lakes Co.* v. *Kierejewski,* 261 U. S. 479 (1923), the employer operated tugs and scows and maintained a shipyard.

In *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U. S. 171 (1924), the employer operated and maintained a floating dry dock for the repair of steamers.

In *Messel* v. *Foundation Co.,* 274 U. S. 427 (1927), the employer was engaged in business as "a ship builder and repairer of sea-going steamships" and the employee was engaged to work in such business.

In *London Guarantee & Accident Co., Ltd.,* v. *Industrial Commission, et als.,* 279 U. S. 109 (1929), the employer was engaged in the operation of steamships and the employee was employed to work as a seaman on board the ships.

In *Robins Dry Dock* v. *Dahl,* 266 U. S. 449 (1925), no question of a workmen's compensation act was presented to the court by either party. The record (R., 15 of that case) discloses that the employer was engaged in the operation of a dry dock and that the employee was employed to work as a shipyard worker.

In *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142 (1928), the employer was regularly engaged in the operation of a dock and unloading boats therefrom and the terms of employee's employment "contemplated that he should work both upon the land and upon the water" and the employee *regularly* performed stevedore service.

In *March* v. *Vulcan Iron Works,* 102 N. J. L. 337 (1926), certiorari denied 271 U. S. 682 (1926), (cited in appellant's brief, pp. 20, 27, 56, 63), the employer "maintained a float-

ing dry dock" and the employee's duties "were to inspect boilers on vessels."

Both these facts clearly indicate a situation having maritime work in contemplation, and scarcely warrant appellant citing the case four separate times in its brief, as being of importance to a consideration of such facts as appear in the case at bar.

In *Doey* v. *Howland,* 224 N. Y. 30 (1918), certiorari denied 248 U. S. 574 (1918), the employee was employed to repair a vessel the repair of which the employer had undertaken.

In *Stewart* v. *Knickerbocker Ice Co.,* 253 U. S. 149 (1920) and *Washington* v. *Dawson,* 264 U. S. 219 (1924), the questions presented were the constitutionality of acts of Congress and in the former case the employee was regularly engaged as a bargeman and in the latter the business of both employer and employee was stevedoring on navigable waters.

Furthermore in some of the above cases, the sole question before the court was the jurisdiction of an admiralty court. In *Gonsalves* v. *Morse Dry Dock & Repair Co.* (*supra*), the question was whether an admiralty court had jurisdiction of an injury occurring in a floating dry dock. That the question of jurisdiction was the only question before the court is apparent from the manner in which the case arose, by appeal directly from the District Court to this court.

In *Great Lakes Co.* v. *Kierejewski* (*supra,* p. 18), the court stated that the sole question was "whether the District Court rightly held that it had jurisdiction to entertain the libel".

In *Messel* v. *Foundation Co.* (*supra,* p. 18), the only question before the court (R., 4, 5 and 6 of that case) was the correctness of the holding of the State Court that the State Court was without jurisdiction to entertain an action for injuries occurring on navigable waters. In view of the "saving clause" of the Judicial Code (Sec. 256, par. 3; Oct.

6, 1917, 40 Stat. 395, c. 97, Sec. 2) the decision of the State Court was clearly erroneous.

In contrast to the facts in the above cases disclosing the general maritime business of the employer, that the employee was engaged to work in a shipyard, in a dry dock, as a ship repairer, or as a stevedore, and had so done over a period of time and that the employer operated a dry dock, a ship repair yards, boats or acted as a stevedore, appellee again calls attention to the record in the case at bar wherein there appears:

(1) Nothing to indicate either that appellee was a marine repairman, employed to work as such, or that he regularly so spent even part of his time, or that he had ever before worked as a marine repairman, other than what inference may be drawn from the fact that at the time of the injury, he was painting angle irons on the "Bald Hill".

In short, there is nothing to *show that the contract of employment contemplated any work of a martime nature,* or repair to any instrumentality of commerce.

(2) Nothing to indicate the character of the business conducted by John Baizley Iron Works, or that it generally engaged in repairing ships, or in work of maritime nature.

(3) Nothing to indicate the type, size or use of the ship, "Bald Hill", on which the injury occurred, or that it was engaged in foreign or domestic commerce, other than such inference as may be drawn from the fact that the "Bald Hill" had "steamed into Philadelphia for necessary repairs" (R., 19).

The employment of appellee on navigable waters at the time of injury was casual and temporary, a mere and *unusual* incident of his usual work on land. (See Comments of Supreme Court of Pennsylvania (R., 24, 34, 35, 36).)

C. Effect of Statutory Provisions in Pennsylvania Upon the Situation of the Parties, With Special Reference to the Provision Holding an Insurance Carrier Liable Directly to the Employee and Suable Directly by Him, and Effect of Contract of Insurance Carrier as Contract for the Benefit of a Third Person.

We come now to a consideration of that portion of appellant's argument discussed under appellant's third division of Point "A", as summarized on page 6 of appellant's brief and amplified in his argument on page 24.

At the outset we may say that we are in general in agreement with the appellant in the summary as outlined by him.

We agree that the principle of uniformity in admiralty and maritime matters has been consistently adhered to by the court. We agree that the doctrine remains unimpaired and should so remain; and we are in accord with the appellant with reference to the point, which will herein be argued, that the effect of the provisions of the various statutes of Pennsylvania and the decisions thereunder upon the insurance carrier is the question of law under consideration, having in view at all times, however, the decisions of this court to the effect that it will follow the law of the state on a question of state law, and especially the state court's construction of a state statute.

Grand Lodge v. *Meyer*, 265 U. S. 30 (1924).

With this latter point always in view, we now approach the question of the effect upon the insurance carrier of that provision of the Act of May 17, 1921 (cited *supra*, p. 2) (Appendix, p. 33), requiring the insurance carrier to pay directly to the injured employee; holding that his obligation to do so shall not be affected by any default of the insured; and that such agreement shall be construed to be a direct promise by the carrier to the employee; and gives a right of action to the employee in his own name against the carrier.

That this doctrine is the law in Pennsylvania has been settled: *Levan* v. *Pottstown & Phœnixville Ry. Co. et al.*, 279 Pa. 381 (1924); and before and after this decision by the highest court of the State of Pennsylvania, it was held by that court that where a contract was made for the benefit of a third person, and a right of action was specifically given such third person by state law, the third person could sue directly upon the promise with the same effect as if the contract had been made specifically and directly with him: *Robertson Co.* v. *Globe Indemnity Co.*, 268 Pa. 309 (1920); *Greene County* v. *Southern Surety Co.*, 292 Pa. 304 (1928).

And the Pennsylvania Supreme Court has likewise held that under a policy of insurance, the beneficiary may sue the carrier directly as a third-party beneficiary, where the policy contains a clause giving a right of action against the Company, by the injured claimant, in case of the bankruptcy of the insured (*A. Rose & Son, Inc., to use,* v. *Zurich General Accident, etc., Co., 296 Penna. 206 (1929)*), and that this should be so is based on sound reasoning, because whether the contract entered into by the insurance carrier is called automobile insurance or life insurance or workmen's compensation insurance, or, even designated by the generic term "insurance policy", a contract is at all times meant, and a proper interpretation of this contract requires the court to merely examine the terms of the contract in the light of the situation of the parties, and if the contract by its terms provides, as does the contract in the case at bar, for payment to a third person, it is to be regarded as a simple promise made to that third person, and the sole question before the court is—Does the contract contain the promise and will the enforcement of that promise against the insurance carrier here deprive it of any protection as to it afforded by any doctrine of constitutional law, relating to the admiralty clause of the Constitution.

It cannot be too strongly urged upon the Court that no just and logical construction points to that contract as having in any wise to do with maritime affairs.

In this connection it may not be amiss to again call the Court's attention to the fact that the Referee found as a fact (R. 9) that the insurance carrier "agreed" to pay the award and that the State law required that this be done in the policy and provided that whether done or not, the policy would be construed as containing that promise.

In making this statement we have not lost sight of that portion of the opinion of Mr. Justice McReynolds in the case of *Northern Coal & Dock Co. et al.* v. *Strand et al.* (*supra*) which appears on page 145: "And it is enough here to say that the State had no power to impose upon an employer liabilities of that kind in respect of men engaged to perform the work of stevedores on ship board"; but, in that case the Court was dealing specifically with the liabilities of the employer who engaged men to perform the work of stevedores on ship board. The Court itself points out that there was nothing in the record to indicate that the Dock Company actually agreed to subject itself to the State Act, and as a reference to the record in that case will indicate, the point was not raised.

In the case at bar, however, not only was both the contract of the employer and the insurance company made with reference to the Act, but, it was made directly thereunder, and therefore the appellee urges the view upon this Court that, the carrier being required by the Act to covenant in his policy to be directly responsible to the employee and suable by him; the Act providing that "Such agreements shall be construed to be a direct promise to the injured employe . . . and shall be enforceable by action brought in the name of such injured employe . . ."[4] we contend therefore that, under such circumstances, particularly with reference to the facts in this case, the carrier, appellant here, is bound by the decision of the State Court, and certainly as to him this Court will follow the ruling of the State Court in a construction of its own statute.

Grand Lodge v. *Meyer* (*supra*).

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[4] Appendix, p. 33.

It is to be borne in mind that the Act itself indicates the public policy of the State and that in order to make that public policy the more effective, it has, in permitting an employer in lieu of contribution to the state fund for the benefit of state citizens, permitted the employer to insure his liability [5] on the condition that at the same time the carrier who undertakes to so insure the employer shall undertake to separately covenant in his policy with the employee, the engagement of the insurance carrier to pay directly to the employee and to be suable by the employee. (Appendix p. 33.)

Appellant urges that even under these circumstances the insurance carrier is only liable to the employee to the extent to which the employer is liable.

Assuming that this position is correct, we answer that since the highest court of the state has held that that liability exists, the matter being one of local concern, this court is bound on the doctrine of applying the State law to State statutes, to hold the insurance carrier liable because the State law provides that he shall be so liable to the employee and liable as on a direct promise, as the State law requires that such policy shall contain his agreement to be so bound, and it nowhere appears that his policy did not contain such a promise and the Pennsylvania Courts have held that he is liable not only under the State law, but under the State statutes; the ruling of the State Court under the facts in the case not only not being palpably unconstitutional, but, as we think we have demonstrated, not involving, as to the carrier, any question of constitutionality whatsoever.

Sweet v. *Rechel*, 159 U. S. 380, 392, 393 (1894).

The appellee, however, goes further than this and urges upon this court the view that the insurance carrier is liable to the employee upon his direct promise to the employee and to hold him so liable, can under no consideration of the

[5] Act of April 7, 1901, P. L. 114, No. 69, Sec. 1.

case be regarded as other than a local matter and not in any wise affecting the uniformity of the maritime law.

We ask the question—How or why can it be said that maritime law is affected when a State court under a State statute holds an insurance carrier responsible to pay an award to an employee with whom he has separately contracted and actually agreed, either in his policy, as required by the Act, or, under the obligation which the State law enacts shall be conclusively presumed as to him to pay the employee the amount of the award as if there was an actual covenant by the carrier to do so.

Does the enforcement by the highest court of a state of an obligation against an insurance carrier affect the uniformity of the maritime law; does the carrier bear any relation to the maritime law; is it engaged in maritime affairs; will such a holding in any wise affect other maritime matters; and what rule of the maritime law will be impinged upon by such a holding?

These are questions which lie at the threshold of the argument, and to which the appellee finds no answer other than the one that the maritime law is in no wise involved.

It is familiar law in the Federal Courts, for example, that although a charter party is a maritime contract and subject to interpretation by admiralty courts, and the parties thereto governed by the rules of the admiralty law, yet, if in that contract there exists, as there always does exist, a covenant upon the part of either the owner of the ship or the charterer of the ship, with the broker effecting the charter party for the payment of commission, the Federal Court in admiralty will not have jurisdiction of a suit by the broker regarding his commission, although the broker may sue for his commission at law, using the charter party as evidence of the contract, and the courts regard that separate covenant in the contract as one made with a third party for his benefit and governed exclusively by common law.

Richard v. *Hogarth*, 94 Fed. 684 (D. C. N. J.) (1899);

Richard v. *Holman*, 123 Fed. 734 (D. C. Md.) (1903).

We urge that this is an analogous situation to the case at bar. The insurance carrier covenants actually or by implication under the statute, directly with the employee to pay the compensation awarded, and, as to it, the highest court in the state having held that he was so liable to pay the award, how can he be heard to say in this court that such a holding is unconstitutional because it interferes with the proper harmony and uniformity of maritime law in its international and interstate relations or works material prejudice to the characteristic features of the general maritime law?

When the employee sues it is on the promise made for his benefit and the suit is upon a contract: *Anderson* v. *Carnegie Steel Company*, 255 Pa. 33 (1916); *Liberato* v. *Royer*, 270 U. S. 535 (1926); *Robertson Co.* v. *Globe Indemnity Co.* (*supra*, p. 22); and, *Greene County* v. *Southern Surety Company* (*supra*, p. 22).

It is a contract for the benefit of a third person, and subject to the general rules of law affecting such contracts except as affected by the special Pennsylvania Statutes and Pennsylvania decisions bearing on the point. See generally. Anson: "Contracts", 3d Amer. ed. by Corbin (1919).

The Pennsylvania Supreme Court has said that the beneficiary of an insurance policy should always be permitted recovery on the policy as a third party beneficiary.

Rose & Son, Inc., v. *Zurich General Accident Co.* (*supra*, p. 22).

We are dealing in the case at bar with the right of the employee and not with any liability of the employer, we are dealing with the Pennsylvania law and with two persons who have made a contract, solely with the state law in view. We are not dealing with the constitutional right of the state

to subject the employer to the Compensation Act. The insurance carrier is permitted by the state to carry compensation insurance, only provided it make the separate agreement for the benefit of the employee. The requirement is soundly based upon a good social policy under an enactment within the police power of the Commonwealth and indicating the public policy of the Commonwealth and in arriving at the liability of the insurance carrier, the ordinary law of insurance has no effect upon the obligations of the parties, if it in any wise diminishes or renders nugatory the provisions of the special act with reference to which the insurance carrier made his contract. He received premiums under that act insured under that act, and, with a view not only to the act but to the decisions thereunder.

We submit that this is not a matter of legal philosophy and legal theory, as appellant, on page 13 of his brief, would seem to indicate; that it is not an attack upon the ruling in the Jensen Case, nor an attempt to evade or circumvent the doctrine of uniformity; nor can it be said to have its origin in the jealousy or ignorance of the State Court as appellant in his brief would imply.

The appellant has stated in subdivision 2 of Point "B" of his Summary (page 7), that the terms of the *general contract* of employment between the parties are unimportant. If he means by this that the important term in the contract in the case at bar is the implied term between the carrier of insurance and the employee, we are in accord. If he means, however, to thus subtly bring himself within the language used by Mr. Justice McReynolds on page 145 of the report of the case of *Northern Coal & Dock Co.* v. *Strand* (*supra*, p. 18), to the effect that nothing appeared in the record showing that the Dock Company in contracting with the stevedores *actually agreed* to subject itself to the liabilities imposed by the State Compensation Act, we answer that this case clearly shows that the parties (The Ocean Accident & Guarantee Corporation, appellant, and Abraham Span, appellee) actually agreed, as under the

Workmen's Compensation Act they are required to agree,—the appellee that he would have a right of action directly against the appellant, and the appellant that such a right of action would exist and that it, the appellant, would pay the compensation awarded.

That there was an actual agreement was directly found by the Referee, "That on January 13, 1926 (the date of the accident) the Ocean Accident & Guarantee Corporation, Ltd., was the insurance carrier of the defendant, and they have agreed to pay for the defendant to the claimant any compensation that may be found to be due arising out of these proceedings" (R., 9).[6]

At this point again, the appellee desires to call special attention to the reasoning of the Supreme Court of Tennessee in the case of the *Nashville Builders Supply Co., et al. (certiorari denied), 277 U. S. 606 (1928)*, the opinion being set out in toto in the appendix (p. 34).

D. Conclusion.

A considerable portion of appellant's brief is spent in a discussion to the effect that this Court has consistently adhered to the principle of Southern Pacific Co. v. Jensen, but the question here presented is not whether that principle shall be adhered to, but whether that principle shall be widened and extended to a situation in which never before has a workmen's compensation act been held inapplicable, and to a situation so clearly a subject of local concern.

In determining the applicability of the state compensation law to an injury occurring in navigable waters, two requirements have been declared by this Court as necessary of fulfillment that the state act apply. The first requirement is that the compensation act must not interfere with the necessary uniformity of the general maritime law in

[6] Having made such an agreement to insure the injured employee, the insurance carrier is estopped from setting up that the employer, a third party, could not constitutionally be required to render compensation to its employees.

Booth Fisheries Co. v. Industrial Com., 271 U. S. 208 (1926).

interstate or foreign commerce, and second, that the state act must not prejudice the characteristic features of the maritime law.

We have examined the first of these tests, and showed that no question of interstate or foreign commerce is concerned, and that therefore, there is no interference with maritime law in interstate or foreign commerce.

The question presented is, then, whether the application of the Pennsylvania Workmen's Compensation Act in the case at bar, will be prejudicial to the characteristic features of the maritime law.

The appellee has particularly called attention to the record in this case, a record which shows that appellee, for the one time that the injury occurred, happened to be doing work on navigable waters, work not part of his regular employment. We have adverted to the rule of constitutional construction that no state act will be declared unconstitutional unless it clearly and palpably appears unconstitutional, and that state legislation is presumed constitutional.

To hold the state compensation act inapplicable because the party happened to venture on navigable waters, will disturb the relations of the parties as contemplated in their contract of employment. It will disturb the social policy of the state as deemed by the state most suited for the needs of its industrial workers.

Viewed from the aspect of maritime law, to hold the compensation act inapplicable merely because the appellee ventured on navigable waters, cannot prejudice the characteristic features of the maritime law. Maritime law aims at a uniform treatment of, and prescribes the law applicable to maritime workers and maritime employers. The appellee in this case is not shown to be a maritime worker, and his employer is not shown to be generally engaged in maritime pursuits. Under such circumstances, there is no policy of maritime law which has for its object the protection of employer and employee in the case at bar.

In matters of local concern, a compensation act may

apply even if the employment is maritime, and the employment of appellee and his employer, if maritime, is of local concern, because the general and usual occupation of both is not showed to be in connection with matters of an admiralty or maritime nature.

Appellee has further emphasized the fact that the contract on which suit is brought, and the only contract properly before the Court in this case, is the contract of appellant insurance carrier to render compensation in accordance with the Act of Pennsylvania which gives the employee a direct and primary right against the insurance carrier, and that the Referee made an express finding that the appellant was *the* insurance carrier and had agreed to pay any compensation found due. Such being the contract, and there being no judgment against the employer, the question is one of the liability of the insurance carrier and no question of the liability of the employer or what compensation an employer might have been required to render is involved in the case.

To hold an insurance carrier which has agreed to render compensation under a state act liable on his covenant, cannot prejudice any of the characteristic features of the maritime law. The enforcement of such a contract does not involve any relation cognizable under maritime law, or any relation for which uniform maritime laws are desirable. Requiring payment of the compensation in accordance with the agreement does not impair or impinge upon any rule where uniformity is essential.

The situation of the parties to this record is a matter of insufficient concern to the Nation to compel a holding that the enforcement of the compensation award to appellee is unconstitutional, there being involved no need of a uniform rule, and no commerce between the states or with foreign nations. The matter is one of local concern best regulated by state or community action, rather than by national law.

A reversal of the Pennsylvania Supreme Court will do violence to the doctrines that the ruling of a State court will

not be disturbed unless palpably unconstitutional, and that the Supreme Court, certainly in a case involving a contract, will construe the contract in accordance with State law.

Wherefore, it is respectfully submitted that the judgment of the Supreme Court of the Commonwealth of Pennsylvania be affirmed.

Respectfully Submitted,

WILLIAM J. CONLEN,
Counsel for Appellee.

SAMUEL MOYERMAN,
Of Counsel.

APPENDIX—ACT OF MAY 17, 1921, P. L. 682, ART. VI, SEC. 651.

Every policy of insurance against liability under "The Workmen's Compensation Act of nineteen hundred and fifteen", and acts amendatory thereof, shall contain the agreement of the insurer to pay all compensation and provide all medical, surgical, and hospital attendance for which the insured employer may become liable under the act during the term of such insurance, and the further agreement that, as between the insurer and any claimant under the act, notice to the employer or the employer's knowledge of an accident or injury constituting the basis of a claim under the act shall be notice to and knowledge of the insurer. Such agreements shall be construed to be a direct promise to the injured employe or to the dependents of a deceased employe having a claim under the act, and shall be enforceable by action brought in the name of such injured employe or in the name of such dependents. Such obligation shall not be affected by any default of the insured, after the accident, in the payment of premiums or in the giving of any notices required by such policy or otherwise.

Act of May 17, 1921, P. L. 682, Art. VI, Sec. 652.

No suit shall be maintained for the collection of premiums upon any policy of insurance under "The Workmen's Compensation Act of nineteen hundred and fifteen," or acts amendatory thereof, which violates any of the provisions of this act.

APPENDIX—OPINION, SUPREME COURT OF TENNESSEE.

(Filed January 21, 1928.)

David S. Lansden, Clerk.

December Term, 1926.

NASHVILLE BUILDERS SUPPLY COMPANY and AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Plaintiffs-in-Error,
v.
MRS. ARZIE BELL,
Defendant-in-Error.

Davidson Law.

This case was instituted by the petition of Mrs. Arzie Bell, in her own behalf and for her three children, as the widow and dependent children of W. E. Bell, to recover compensation for the death of W. E. Bell, under the provisions of the Workmen's Compensation Law, chapter 123 of the Public Acts of 1919.

The Nashville Builders Supply Company, Incorporated, was Bell's employer, and the Aetna Life Insurance Company, its co-defendant, had issued a policy of insurance, requiring it to pay to the employees of the Nashville Builders Supply Company, or to their dependents, in case of their death by accident, whatever compensation they should be entitled to receive from their employer under the provisions of said statute; the policy of insurance containing the provisions required by section 45 of the Workmen's Compensation Statute.

Bell met his death by drowning in the Cumberland River, a navigable stream, when the steam dredge boat, on which he was asleep, turned over. Recovery of compensation is resisted on the ground that Bell's contract of employment was maritime in its nature, and that his death was

maritime, with the result that the rights of the parties cannot be affected or controlled by the statutes of the State of Tennessee, but must be measured exclusively by the provisions of the general maritime law of the United States.

The Circuit Court of Davidson County found for the petitioner, and from the judgment of that court the plaintiffs in error have prosecuted their appeal in the nature of a writ of error.

At the time of Bell's death, May 18, 1925, and prior thereto, the Nashville Builders Supply Company was engaged in the business of dealing in building materials, including sand and gravel, with its place of business located in Nashville, Davidson County, Tennessee. All of its business was done with customers located in or near the City of Nashville, and no part of its business was interstate. None of its operations extended beyond the limits of the State of Tennessee. As a part of its business the company procured sand and gravel from the Cumberland River by means of a dredge and barges. It owned a dredge boat, operated by steam, which was employed both in the actual work of dredging, and in towing the empty barges from the company's wharf to the point or points where the sand and gravel were obtained, and in towing the barges filled with sand and gravel back to the company's wharf. This boat was used exclusively for the handling of the sand and gravel, and Bell was employed by the company to take charge of the boat and control its operations in loading the sand and gravel and bringing it to the company's wharf.

In addition to Bell eight men were employed in the operation of the boat and the work of dredging. Bell held a pilot's license, but the operation of the boat was of such a character that a captain was not required. The company permitted Bell to use his own judgment as to the points from which sand and gravel should be secured, and at the time of the accident the officers of the company did not know the point to which the boat was being carried.

This boat, in charge of Bell, left Nashville on the afternoon of the day mentioned, and about 6:30 p. m. had reached a point twelve miles from Nashville, by water, and about six to seven miles by land. At this point, which was in Davidson County, the boat was moored to the bank for the night.

The President of the company testified that this was done in order that the Federal statutes regulating the number of hours the boat crew could be kept at work, without rest, might not be violated; but a member of the crew, who was present on the boat, testified that the stop was made because the crew was not supposed to run the boat at night. If material, we would be required to accept the latter statement as to the cause of the stop, in reviewing the action of the trial court.

While the boat was moored, as above stated, and after Bell had retired in the pilot house, the boat, for some unexplained cause, turned over about 10:30 at night, and Bell was drowned.

It has already been stated that the Nashville Builders Supply Company, the employer, held an insurance policy, issued by its co-defendant, conditioned, among other things, as required by section 45 of our Workmen's Compensation Statute, chapter 123 of the Public Acts of 1919.

Mr. Richardson, president of the company, a Tennessee Corporation, not only testified that his company carried compensation insurance, but stated further: "I thought I was operating under the Workmen's Compensation." The question calling for this statement was objected to, but the ruling of the trial judge admitting this statement in evidence, has not been assigned as error in this court.

The Workmen's Compensation Statute of Tennessee is not compulsory in its application to employers or employees. It is elective, and either an employer or employee may prevent the application of the statute to the contract of employment by taking designated action at the outset. Consequently it has been uniformly held by this court that an action for compensation, as prescribed by the statute, is not

an action in tort, but is an action on the contract of employment. Scott v. Nashville Bridge Co., 143 Tenn. 86.

By the institution of this suit the widow of Bell, for herself and minor children, is affirming the application of the Workmen's Compensation Statute to Bell's contract of employment; and the employer, through the testimony of its president, has admitted its recognition of the application of the statute to the contract of employment, without protest, until the filing of the defense to this suit. From his failure to indicate the contrary, Bell's assent to the application of the statute will be presumed.

The other plaintiff in error, Aetna Life Insurance Company, has filed in the record a copy of the policy issued by it, from which it appears that in consideration of a premium apportioned to the particular item, the operations of the Builders Supply Company covered by the policy included "dredging—by floating dredges. All operations except rock drilling and blasting."

It thus appearing that both of the plaintiffs in error contracted with and for the benefit of Bell, recognizing and conscious of the application of the Tennessee Compensation Statute to the contract of employment, we would be loath to reach a conclusion denying the benefits of the contract and statute to the dependents of Bell, unless forced to do so by the decisions of the Federal Supreme Court. Principles of common justice and equity require that any doubt as to the application of the statute should be resolved in favor of the petitioners herein.

Article 3, Section 2, of the Constitution of the United States provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

In Southern Pacific Co. v. Jensen, 244 U. S. 205, 214, the Supreme Court of the United States, dealing with the intention of the framers of the constitution, as expressed in the language used, quoted from the earlier opinion in The Lottawanna, 21 Wall., 558, as follows:

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

The Supreme Court, in Southern Pacific Co. v. Jensen, then recognized that the general maritime law may be changed, modified or affected by state legislation; and in defining the limitation of the power of the states the court said:

> "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from The Lottawanna."

Applying the principles indicated in the foregoing quotations, the Supreme Court in Southern Pacific Co. v. Jensen denied the power of a state to apply its compensation statute to the contract of employment of a stevedore, when it appears that the contract was maritime in its nature and that the injuries for which compensation was sought were also maritime; but it further appeared that the injury occurred while the stevedore was working on a steamship operated in interstate commerce between the ports of New York and Galveston, Texas, and the conclusion of the court was that the application of the compensation statute of the

state to foreign ships coming into the ports of a state would destroy "the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

It may be stated in passing that the decision in the case just referred to was accompanied by elaborate dissenting opinions filed by Justice Holmes and Justice Pitney, in both of which Justice Brandeis and Justice Clarke concurred.

In the case of Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 466, the application of a Workmen's Compensation Statute of the State of Oregon to a contract of employment between a shipbuilder and his employee was resisted, particularly on the ground that the accident and injury, for which compensation was sought, occurred on board a vessel lying at a dock in a navigable stream. The vessel was being completed at the time of the accident, and the injured employee was working as a carpenter on board. In that case it appears that the employer and not the employee sought to have the state statute applied. The Supreme Court held that an action to recover damages resulting from the tort committed by the employer was within the general admiralty jurisdiction, but also held that under the facts of the case the state compensation act would apply so as to abrogate the right of the injured employee to recover damages in an admiralty court. The court found that both parties to the contract of employment had so proceeded under the state statute as to make it appear that they had not consciously contracted with each other in contemplation of the general system of maritime law, and that, under such circumstances, the subjection of their contractual rights, obligations and liabilities to the provisions of the state statute would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

Responding to the certificate and questions of the Circuit Court of Appeals, the court held that the facts of the case established a tort within the admiralty jurisdiction of the United States courts, but that in the stated circumstances "the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist."

While the Supreme Court, in Grant Smith-Porter Ship Co. v. Rohde, *supra*, "stressed" the point that the parties consciously contracted with reference to the local statute and not with reference to the general maritime law (Millers' Indemnity Underwriters v. Braud, 270 U. S. 59,), the predicate of the decision of the court was its finding that "the matter was only of local concern, and that to permit the rights and liabilities of the parties to be determined by the local law would not interfere with characteristic features of the general maritime rules." Washington v. Dawson & Co., 264 U. S. 219, 227.

In Millers' Indemnity Underwriters v. Braud, 270 U. S., 59, 70 Law Ed., 470, the Supreme Court applied the principle of the decision in Grant Smith-Porter Ship Co. v. Rohde to the case of an employee of a ship building company who had submerged himself, as a diver, from a floating barge anchored in a navigable stream, for the purpose of sawing off the timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation; the diver having died of suffocation while thus submerged on account of the failure of the air supply. The Supreme Court again held that the case disclosed "facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act."

After so stating, the Supreme Court concluded as follows: "but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The

act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

In each of the cases last considered the Supreme Court appears to have made the application of the state statute depend upon the facts of the particular case; and the rule seems to be that the state compensation statute may be applied to an industrial accident constituting a maritime tort within the jurisdiction of the admiralty courts of the United States, whenever the application of the state statute to the particular case is of only local concern and does not work material prejudice to any characteristic feature of the general maritime law or tend to destroy the uniformity of the general maritime law in its application to the intercourse of the states with each other or with foreign states.

The Supreme Court has considered other cases and found them to present "matters which were not of mere local concern, because of their special relation to commerce and navigation," and so beyond the regulatory power of the state. Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479; Washington v. Dawson & Co., 264 U. S. 219; Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171; Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449; Messel v. Foundation Company (decided May 31, 1927), —— U. S., ——, 71 L. Ed. 836.

We have examined these cases and have failed to find in them a statement of an exact or arbitrary line of demarcation beyond which a state may not go in applying its compensation statute to the facts of a particular case. There is to be found no evidence of an intention on the part of the Supreme Court to depart from the statement in Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 217: "It would be difficult, if not impossible, to define with exactness how far the general maritime law may be changed, modified or affected by state legislation. That this may be done to some extent cannot be denied."

So we must conclude that the courts are vested with some discretion in determining whether the facts of a particular case present matters of mere local concern, the regulation of which by a state statute of the character here involved will not contravene the essential purpose expressed by an act of Congress, nor work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relation. Southern Pacific Co. v. Jensen, 244 U. S. 205; Washington v. Dawson & Co., 264 U. S. 219; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52.

Southern Surety Company v. Crawford, (Texas Court of Appeals), 274 U. S. 280, was an action on a policy of compensation insurance issued to the employer of a deckhand, who lost his life when a dredge boat on which he was employed was capsized and sunk. At the time of the accident the boat was located in the navigable waters of Galveston Bay, and was actively engaged in the work of dredging the channel as an aid to navigation. The fact that the dredge boat was not equipped with self-propelling machinery, but was towed from place to place, does not seem to be material. It was a vessel, as that term is used in the Acts of Congress, and subject to admiralty jurisdiction. United States Code, title 1, section 3: Seabrook v. Raft of Railroad Cross Ties, 40 Fed. Rep. 596; In re P. Sanford Ross, 196 Fed. Rep. 921.

The Texas Court of Appeals held that the employment of the deckhand sustained "no direct relation to commerce of any sort, being essentially local in character." And after referring to Grant Smith-Porter Ship Co. v. Rohde, *supra*, and State Industrial Commission v. Nordenholt, 259 U. S. 263, the court said:

> "The fact that the dredge was a floating one on navigable waters does not take this casualty out of the operation of the principle applied to these authorities,

because the employment here—that of a deckhand on a non-self-propelled boat engaged in the improvement of a Texas inland harbor channel, even if maritime at all, is yet within their meaning, to be deemed of such a local nature as not to materially affect any rules of the sea whose uniformity is essential, and therefore cognizable by the state courts."

The Texas Court awarded recovery to the plaintiffs, and certiorari was denied by the Supreme Court of the United States. —— U. S. —— 70 L. Ed. 783, 46 Supt. Ct. Rep. 353.

In Travelers' Insurance Company v. Bacon, 30 Ga. App. 728, 119 S. E. 458, the holding of the Georgia Court of Appeals is authority for petitioners herein, as follows:

"Assuming that the contract of employment, under which the duties of the employee were to proceed with the master's boat into navigable waters and there operate the same for 'fish for prawn . . . and shrimp' around the bars, and always in sight of land, for a compensation to be determinable by the size of the catch, and return to shore and deliver the fish by a truck at a designated place, where they are afterwards, by others, prepared for market, and also while on land, taking care of the nets and looking after the boats and tackle, was a maritime contract; and also, assuming that the death of the employee, who was drowned after jumping from the boat for the purpose of extinguishing flames upon his clothing, which had been ignited by an explosion on the boat, which was at the time in a body of water designated as a 'creek', and upon which boat the deceased was employed to fish for prawn around the bars and in inland waterways, never out of sight of land, constituted a maritime tort, it does not appear that the general employment contracted for, nor the work performed by the employee, had any direct relation to navigation or maritime commerce, but was a purely local matter, and, as was held in Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008 (decided January 3, 1922); 'Under such circumstances regulation of the right, obligations

and consequent liabilities of the parties, as between themselves, by a local rule, would not necessarily work material prejudice to any characteristic with the proper harmony or uniformity of that law in its international or interstate relations.' "

The case of Lindberg v. Southern Casualty Company, 15 Fed. (2nd), 54, was affirmed by the Circuit Court of Appeals, 18 Fed. (2nd), 453, and certiorari was denied by the Supreme Court, — U. S. — 71 L. Ed. 878. Compensation under a state statute was awarded for the death of an employee on a floating dredge, creating a navigable channel from a lake to a river. Conceding the jurisdiction of admiralty, but for the application of the local statute, the district judge held the matter of local concern and subject to local control, following Southern Surety Company v. Crawford, *supra*, and Millers' Indemnity Underwriters v. Braud, *supra*. However, it would seem that the facts of that case did not present either a maritime contract or a maritime tort, and the case is hardly to be considered as authority here, except in so far as the opinion of the district judge is concerned.

The facts of the case before us do not show the commission of a tort by the employer or his agents. The cause of the accident is not disclaimed, and is subject only to conjecture. The action is purely one of contract, and it seems clear that all the parties, including the insurer, contracted with reference to the local statute, and not with reference to the general maritime rules. To hold otherwise would impute fraud to the insurer in accepting the premium for the item above quoted from the insurance contract. The vessel on which Bell was employed was not engaged in commerce of any kind. Its movement was not interstate, and its activities were purely local in character and of only local concern. It was not engaged in transporting freight or passengers for hire, and the sand and gravel moved by it were only for the employer's account.

We hold, therefore, that the facts of the case show a matter of local concern, subject to state regulation in the particular here involved, and the judgment of the circuit court will be affirmed.

SWIGGART, *J.*

OFFICE OF THE CLERK OF THE SUPREME COURT

For the Middle Division of the State of Tennessee.

I, DAVID S. LANSDEN, Clerk of said court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its December term, 1927, in case of Nash. Bldrs. Sup. Co. *et al.* against Mrs. Arzie Bell as appears of record now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the sixth day of November, 1929.

(SEAL)

DAVID S. LANSDEN, *Clerk.*
By ....., *D. C.*